IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-97

MICHAEL PETRYCKI,

Petitioner,

vs.

YOUNGSTOWN & NORTHERN RAILWAY COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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Michael Petrycki prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on March 23, 1976, which judgment became final on the denial of a timely Petition for Rehearing on May 7, 1976.

OPINION BELOW

The Opinion of the Court of Appeals is set forth in Appendix A hereto (pp. A1-A11, *infra*). The Opinion of the Court of Appeals is officially reported at 531 F. 2d 1363.

JURISDICTION

The judgment of the Court of Appeals, set forth in Appendix B hereto (pp. B1, B2, *infra*), was entered on March 23, 1976, which judgment became final on the denial of a timely Petition for Rehearing by the court on May 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

The petitioner, a railroad employee, sought damages under the Federal Employers' Liability Act (45 U.S.C. § 51) and under the Coupler Provisions of the Federal Safety Appliance Act (45 U.S.C. §2). His case went to a jury which returned a verdict for him.

Prior to the return of the verdict, the jury sent a written question to the trial judge inquiring whether they were limited in the amount which they could award. The District Judge, without contacting counsel for either party, answered the query in writing stating that the jury was limited by the *ad damnum* and that it was $250,000. The

Court of Appeals reversed and remanded holding that the court's communication was prejudicial error. The question presented is whether the Court of Appeals erred in holding that the plaintiff must prove with certainty that the court's response *sua sponte* was harmless.

STATUTORY PROVISIONS AND RULE INVOLVED

The statutory provisions principally involved are Section 51 of the Federal Employers' Liability Act and Section 2 of the Federal Safety Appliance Act, which provides as follows:

Section 1 (45 U.S.C. §51):

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or

closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 2 (45 U.S.C. §2):

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Rule 61 of the Federal Rules of Civil Procedure is involved and provides as follows:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT

This case arose when petitioner, the plaintiff below, sued for damages because of injuries claimed to have been received while working as a brakeman on a crew switching cars near Youngstown, Ohio on August 25, 1971. Evidence received at the trial established that a coupling failed twice when the plaintiff's conductor attempted to couple the cars. After the second failure, the conductor went between the cars to straighten the couplers. The cars rolled back upon him crushing his hand in the coupler. The plaintiff responded to the conductor's screams and hurriedly attempted to get the operator of the engine to separate the cars and free the conductor's hand.

The plaintiff's evidence established that the failure of the train crew to act upon his signals caused him to rush to exhaustion in various directions. Because of the construction of the building, the curvature of the tracks and the piles of machinery in the area, it was difficult to see the plaintiff. After his signals were finally acted upon, an ambulance was obtained for the conductor and the crew was sent home.

The plaintiff testified that when he got home he was still shaking and was sick; that he went to work the following two days, but that he did little work. On Saturday and Sunday, he just laid around. On Monday at work, he had an awful pain in his chest about three hours after he started. He did no further work, but laid around until the end of his shift and called his family doctor the following morning. He received an examination and was then sent to the hospital. He remained in the hospital for ten days and was then hospitalized on three other occasions culminating in heart surgery in which all three coronary arteries were by-passed because of blockages (R. 228-237).

Medical testimony was proffered that the plaintiff's physical condition and his operation were causally related to the accident and the exertion by the plaintiff on August 25, 1971 (R. 238-245). The railroad conceded that the evidence on the Safety Appliance Act allegation created a submissible issue for the jury (R. 443-444). On appeal, the railroad, nevertheless, assigned error on its contention that it was the curvature of the track rather than the safety appliance which prevented the coupling upon impact and also contended that there was no causal connection between the violation and the plaintiff's injury (Brief for Appellant, pp. 43-48). The Court of Appeals recognized that the railroad sought only a new trial. For inexplicable reasons, that court in a footnote, however, stated that a motion for a directed verdict ". . . may be determined . . ." on the retrial of the case (Opinion p. 6).

The Opinion states that it deals with only one issue which it phrases as "whether the effect of the District Court's having answered the sequestered jury's question, without prior notice to counsel, was such as to render that action reversible error."

The circumstances of the communication between the trial judge and the jury were relatively simple. During his oral argument, plaintiff's counsel stated in asking for damages (R. 489):

> "And His Honor will instruct you, of course, that money begets money, and it must be reduced to its present worth. But that is what it shows mathematically—over $205,000 minimum."
>
> "Perhaps you people think he's entitled to more. We have sued for more."

The statement by counsel caused the jury to submit a question to the court in writing after it had commenced its deliberations. That question was:

> "Are we correct in understanding we may award only up to the amount asked for by the plaintiff and, if so, is the figure $205,000 quoted as the maximum?"

As the Court of Appeals correctly states, the judge's written response was:

> "The prayer of the complaint sets forth the maximum amount that may be awarded. The prayer is for $250,000."

This was done in the absence of counsel and without their knowledge. After the jury had reached a verdict, but before it was returned, the court told both counsel about the question and his answer. No objection was made by either counsel (R. 540, Opinion of the District Court denying the Post Trial Motions). The identical information that the jury was limited by the *ad damnum* of the complaint and the amount thereof which the court gave in response to the jury's question, was also contained in an instruction tendered by the plaintiff which was rejected by the court because of the court's policy of not talking about the prayer (R. 453). The court, however, gave the related instruction tendered by the plaintiff (R. 453, 520):

> "The allegations of the Complaint as to the amount of damage plaintiff claims to have suffered are not to be considered, except that the damage claimed does fix a maximum limit, and the jury may not award the plaintiff more than the amount claimed in the Complaint."

The Court of Appeals' decision is based on its finding that the "secret communication" was error in that the burden was upon the plaintiff to produce affirmative evidence that the error was harmless. In reviewing the circumstances, that court erroneously states that the plaintiff had asked for "only $205,000" and then speculates that

the court's response to the question "indicates strongly" that the jury was influenced at least to the extent of $42,400 (Opinion, p. A10). Nevertheless, the court below rejected the ordering of a remittitur in that amount. Instead, the court speculates that the jury might not have decided for Petrycki or that the presence of counsel might have changed the final verdict. In so speculating, it relies upon this Court's decision in *Fillippon* v. *Albion Vein Slate Company,* 250 U.S. 76 (1919) and chooses not to follow *Rogers* v. *United States,* 422 U.S. 35 (1975) which it mentions at the beginning of its Opinion. This might have been predicted because the court had announced the obviously erroneous proposition that "the same rule applies equally to civil actions and criminal cases . . ." (Opinion, p. A7).

On top of such speculation, the court below cast upon the plaintiff an impossible burden of proof and required him to establish "with certainty that no harm was done" (Opinion, p. A11). The obverse of that rule had been stated in *United States* v. *Compagna,* 146 F. 2d 524, 528 (2d Cir. 1944) and the Opinion below is an attempt to transpose that rule. The imposition of such a harsh rule in a civil case, however, almost totally disregards the holding as to criminal cases of this Court in *Rogers* v. *United States,* 422 U.S. 35 (1975).

REASONS FOR GRANTING THE WRIT

THE OPINION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *ROGERS* v. *UNITED STATES,* 422 U.S. 35 (1975) AND IS ALSO IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS. THE OPINION DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS SO THAT IT REQUIRES AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

1. The rule, imposed below, requires a plaintiff with a verdict to establish "with certainty" that a court's response, made without the knowledge of both counsel, in writing to a jury question "did not harm". That "rule" is in conflict with this Court's Decision in *Rogers* v. *United States,* 422 U.S. 35 (1975). There, this Court announced that oral instructions or responses in writing in criminal cases are subject to the harmless error rule stated in Federal Rule of Criminal Procedure 52 (a). The criminal defendant there was charged with making oral threats "to take the life of or to inflict bodily harm upon the President of the United States". 2 hours after the case went to the jury, a note was sent inquiring whether the court would accept a guilty verdict with "extreme mercy of the court". The marshal who delivered the note was instructed to advise the jury that the court's answer was in the affirmative. Within 5 minutes, such a verdict was returned. (Defendant's counsel was not informed of this communication and did not learn thereof until after the granting of the Petition for Certiorari.) Such circumstances were found by this Court to be tantamount to a request for further instructions.

None of these circumstances exist in the instant case. The facts and holding in *Rogers* directly conflicts with the Decision below because the communication by the court below was in writing and did not amount to a "further instruction". As set out on Page 5 of the Opinion, it informed the jury that the prayer of the complaint sets forth the maximum amount that could be awarded. This information was identical to a statement contained in the court's charge (R. 520). The only additional information imparted to the jury is contained in the second sentence: "The prayer is for $250,000." The court, by speculation and conjecture, conjured up a non-existent harm to the defendant in such information even though the imparting thereof conferred a benefit upon the defendant since the verdict was returned for an amount less than the *ad damnum*. In denying the defendant's Motion for a New Trial, the District Judge recognized this benefit and pointed out that the response to the jury's question may have prevented the jury from awarding an amount in excess of the *ad damnum*, an amount upon which a judgment could have been entered even though it would be in excess of the prayer (A. 293).

The Opinion below, however, rejected the analysis of the experienced District Judge without any consideration whatsoever. It also rejected this Court's analysis of the factual situations in *Rogers*. Instead, the Opinion promulgated its unique rule that communications between a judge and jury, without notice to counsel, constitute reversible error and that the same rule applies in both civil and criminal matters. It then fallaciously states that *Rogers* stands for the same proposition and contends that this is "illustrated" by this Court's reliance upon *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76 (1919), at which point it quotes a paragraph from *Rogers* treating that case which in context is clearly prefatory to the holding of this Court.

The Opinion below does not itself discuss *Rogers* at any other point. It does, however, rely upon a treatment of that case by the same Circuit in *United States* v. *Gay*, 522 F. 2d 430 (1975). The factual situation in *Gay* is wholly inapposite. The quotation is also inapposite, containing only a summary of the general rule that counsel should be consulted before the court answers any communication from the jury. In *Gay*, the communication took place after the jury was sworn and concerned and *in camera* discussion with certain jurors following which they were excused. Counsel were not consulted concerning the reasons for such decisions. Clearly, such conduct bears no relation to the circumstances in the instant case.

Surprisingly, at this point, the Opinion below recognizes that this Court had squarely decided that the harmless error rule applied to such communications. Unfortunately, the Opinion does not again discuss or apply that rule to the facts in the instant case.

Instead, it rejects the obvious interpretation of the effect of the communication between the court and the jury. First, it states that the jury's prompt return of the verdict for $247,400 indicates that the jury was influenced by the court's response at least to the extent of $42,400, this being the amount in excess of $205,000, the minimum amount of the plaintiff's damages stated by plaintiff's counsel in his summation. It then astoundingly states:

> "It is true that the jury's note carried an implication that it had decided for Petrycki and was interested only in the amount it could award. Still, the jury's deliberations had not ended. It cannot be said with certainty that the jury had in fact decided for Petrycki or that any such decision, if it had been made, might not be revoked as deliberations continued. What counsel, if present, might have done and what the effect

> of their absence on the final verdict may have been are matters of conjecture. That such considerations raise the possibility of adverse effects upon substantive rights, and that no countervailing evidence of harmlessness is present, is sufficient, however, to require reversal."

In its Petition for Rehearing, plaintiff stated that he would accept a remittitur of $42,400 to cure any effect on the verdict because of the response to the jury's question. Such acceptance would eliminate any benefit accruing to him if the court's response had led to the augmenting of the jury's verdict. The court below rejected that offer when it denied plaintiff's Petition for Rehearing. Thus, the Decision below requires a retrial where the only possible prejudice to the defendant could have been cured by accepting the plaintiff's consent to a remittitur of the offending amount. The alternative ordered by the court below not only confuses the requirements of a fair trial with the ideal of a perfect trial, but in this case, unlike most other cases in which a new trial is ordered, plaintiff and his counsel were unaware of the conduct which the court below has held to be reversible error until both counsel were informed before the jury returned its verdict of the facts concerning the question of the jury and the court's response in writing. Plaintiff's counsel had no objection at that time and cannot conceive of any rational objection that can be made now.

Before the return of the verdict, defense counsel made no objection. On appeal, the objection was made that it was clearly prejudicial because the subject of the question was of the utmost relevance to the parties; "damages and the prayer for relief in the Complaint" (Brief for

Appellant p. 27). Defendant's only suggestion was to give two instructions from Devitt, *Federal Jury Practice and Instructions*, Vol 2, § 78.01 and 78.02 (Brief for Appelant p. 29, 30). At the time of the filing of that Brief, defendant was evidently unaware of the fact that the second of the two instructions was included in the court's charge (R. 520). The other instruction suggested by the defendant, in essence, conveyed in more words the information given by the court in response to the jury's interrogatory. Thus, it is seen that the Opinion below not only differs from *Rogers* v. *United States*, 422 U.S. 35 (1975), but conflicts with the Brief filed by the defendant in its appeal.

Additionally, the reliance on *United States* v. *Gay*, 522 F. 2d (6th Cir. 1975) ignores the careful reading of *Rogers* in that Opinion. *Gay* squarely states that this court's holding was based upon Rule 43, Federal Rules Criminal Procedure, requiring that a defendant be present in a criminal case at all proceedings from the impaneling of the jury until it is discharged after the returning of its verdict. Despite this clear statement of the difference between criminal and civil cases, the Decision below obtusely promulgates its "rule" which it states applies equally in criminal and civil cases. There have been many cases dealing with a court's response to a question from a jury without notice to counsel, but until the court below spoke no such "rule" was ever announced. Since the Decision below was handed down, no other court has followed that "rule". The "rule" directly undermines this Court's careful exposition in *Rogers* v. *United States*, 442 U.S. 35 (1975) and for that reason alone should be reversed by this Court.

2. The court below compounds its conflict with this Court by directly conflicting with the 7th Circuit. *Charm Promotions, Ltd.* v. *Travelers Indemnity Co.*, 489 F. 2d

1092 (1973). That conflict may have been unrecognized, but should not have been. This is because the Opinion below specifically mentions the 7th. Circuit case and it states that it holds such communications will not require reversal where substantial rights of the party have not been adversely affected (p. A9). In its second and last sentence concerning *Charm Promotions, supra,* the court below states that such communications are subject to the harmless error rule as set forth in Rule 61 of the Federal Rules of Civil Procedure, the majority of which is then quoted. Neither that case nor the harmless error rule is mentioned again and, of course, neither was taken into consideration in promulgating the unique "rule" announced below.

If the court below had correctly analyzed *Charm Promotions, supra,* it is most probable that the result would have been different. The 7th Circuit Opinion is both learned and logical while the Opinion below fails in both respects. *Charm Promotions, Ltd.* v. *Travelers Indemnity Co.,* 489 F. 2d 1092 (1973) discusses the problem involved in *ex parte* communications in both criminal and civil matters. It analyzes those cases and finds a split in the holdings as set out in the Opinion of Judge Learned Hand in *United States* v. *Compagna,* 146 F. 2d 524, 528 (2d Cir. 1944), *cert. denied;* 324 U.S. 867 (1945). It notes that prior to, and in, that case (a case relied upon by the Opinion below as a basis for its rule) the trend swung away from holdings that any *ex parte* communication was *per se* reversible error to the newer position that such communications constitute harmless error where the substantial rights of the parties are not affected. *Charm Promotions, supra* is thus the civil case equivalent of *Rogers* v. *United States,* 422 U.S. 35 (1975), both squarely holding that the harmless error rule applies to such communications. *Charm*

also announces a rule directly contrary to that promulgated below when it states that a more restrictive rule should prevail in criminal cases where an individual's liberty is at stake and contrariwise, a less rigorous standard is mandated in civil cases. In footnote 6 at 489 F. 2d 1095, it accents this holding by stating that it should be noted that *Shields* v. *United States,* 273 U.S. 583 (1927) was a "criminal case where the demands of due process are especially strong". Finally, it should be noted that the question addressed to the jury in *Charm Promotions, Ltd.* v. *Travelers Indemnity Co.,* 489 F. 2d 1092 (1973) was one much more closely related to the ultimate issue. There the jury asked whether the third party defendants "could have a criminal judgment brought against them". The judge wrote back: "No". Plaintiff's counsel did not become aware of the communication until one week later. Furthermore, neither the jury's question nor the judge's answer were preserved for the record. Instead, they were established by the affidavits of two jurors.

In these circumstances, the Court of Appeals found the communication did not affect the substantial rights of the parties. It noted that the communication was irrelevant to the ultimate issue which was Travelers' liability to Charm for the dishonest acts of Charm's employees though the court admitted that the communication was susceptible to differing interpretations. Particularly pertinent here is the court's reliance upon a part of the charge to the jury as limiting the effect of the *ex parte* communication. As we have previously pointed out, the subject matter of the communication, the limitation in the amount of damages that could be awarded, is clearly set out in the charge of the court and that charge undoubtedly precipitated the communication which the court below found to be reversible error. That charge also told

the jury that they must decide the issue of liability first before considering the issue of damages (R. 519, 520). That instruction constituted the law of the case. In overlooking such instruction, the court below disregarded a primary consideration in determining appeals. That consideration was best phrased by Mr. Justice Brandeis in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933):

> "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

In all these circumstances, it is clearly seen that the Opinion below conflicts with *Rogers* v. *United States*, 422 U.S. 35 (1975) and also conflicts with the decision of the 7th Circuit Court of Appeals in *Charm Promotions, Ltd.* v. *Travelers Indemnity Co.*, 489 F. 2d 1092 (1973). It is also directly in conflict with the newer rule announced in both *Rogers* and *Charm* squarely holding that *ex parte* communications in both civil and criminal cases are subject to the harmless error rule. The Opinion below is not only a throw back to the now discarded *per se* rule, it announces a "rule" without precedence, a rule furthermore which would require an unnecessarily restrictive standard in civil cases for no reason other than the fact that such a standard was once considered appropriate in a criminal case where a defendant's liberty was at stake.

3. This Court additionally should grant Certiorari in the instant case in light of its continuing supervision of the work of, and the procedures in, the federal courts. The Opinion below not only conflicts with this Court and with the 7th Circuit and with the newer harmless error rules extant in other Circuits, but is also in the words of Rule 19 of this Court so far "from the accepted

and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision. The decision below should not be left undisturbed because, left undisturbed, it can have only a pernicious effect upon the federal courts.

CONCLUSION

For the reasons adverted to above, and because of the demands of the law and of substantial justice, the Petition for Certiorari should be granted.

Respectfully submitted,

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July 21, 1976

APPENDIX A

No. 75-1371

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

MICHAEL PETRYCKI,

Plaintiff-Appellee,

v.

YOUNGSTOWN & NORTHERN RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed March 23, 1976.

Before: WEICK, Circuit Judge; LIVELY, Circuit Judge, and MARKEY, Chief Judge, United States Court of Customs and Patent Appeals.*

MARKEY, Chief Judge. This appeal is from a judgment entered in the District Court upon a jury verdict in favor of the plaintiff in an action for damages for personal injuries brought under the Federal Employer's Liability Act, 45 U.S.C. §§ 50 [sic] *et seq.*, and the Federal Safety

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* The Honorable Howard T. Markey, sitting by designation.

Appliance Act, 45 U.S.C. §§ 1 *et seq.* We reverse the judgment of the District Court and remand the case for a new trial.

Facts

Plaintiff-appellee, Petrycki, was employed by appellant-defendant, the Youngstown & Northern Railroad Company. On August 25, 1971, the day on which Petrycki claimed to have been injured, he was working, under the supervision of the conductor, as a rear brakeman of a crew switching cars in the MacDonald Works Yard near Youngstown, Ohio. The complaint alleges that a coupling failed twice because the drawbars of the couplers were out of alignment.

After a second unsuccessful attempt to couple the cars, the conductor went between the cars to correctly position the drawbar on the standing cut of cars. While the conductor was in that position, the cars rolled back upon him, crushing his hand in the couple. The conductor called to Petrycki to signal the train operator to move the cars. Petrycki claims that the train crew did not immediately respond to his signals and that he was thus caused to rush about in various directions, attempting to have his signals acted upon, producing exhaustion and physical activity which, in turn, produced his heart attack some five days after the accident involving the conductor. Petrycki's fellow switching crew members apparently had no knowledge of his alleged anxiety and were unable to corroborate certain of his claimed activities immediately after the injury to the conductor. Petrycki drove his car home from work following the accident. He returned to work the next day, a Thursday, and worked on Friday. Saturday and Sunday were his regular days off. He testified that during those few days he was trying to get the picture of the conductor's mangled hand out of his mind; that thinking of it made him sick; that he had trouble sleeping; and that he was perspiring and trembling continuously.

Nevertheless, Petryski returned to work the following Monday. After about three hours on the job, Petrycki experienced severe chest pains and difficulty in breathing. He lay down until quitting time, when he drove himself home and went to bed. The next day, Petrycki consulted his family physician, Dr. Joseph S. Gregori, who arranged his admission to St. Elizabeth's Hospital that same day. Petrycki gave a history of his ailments to Dr. Gregori as well as to the admitting doctor at the hospital. That history, as contained in the hospital records, reveals nothing about the incident in the railroad yard five days earlier, which is now claimed as the cause of Petrycki's heart attack. Instead, it sets forth that he experienced pains in the region of his heart one month previous while he was in his garden and that there was a similar episode on the day prior to his admission to the hospital. The relevant portion reads as follows:

> HISTORY: This patient presented with history of retrosternal discomfort 1 month previous with pain radiating to the left arm. It was associated with transient shortness of breath and nausea. It lasted ¾-1 hour. There was recurrence of similar episode on the day prior to admission that persisted more or less throughout the night.
>
> EKG taken at the doctor's office showed marked change to that taken 2 years prior. The EKG showed inverted T waves in leads 2, 3, AVF, and Q waves also in 2, 3, and AVF and V3 to V6.
>
> The patient also complained of increasing external dyspnea for 6-9 months. There was no history of ankle edema.

Petrycki remained in the hospital from the day of his admission, August 31, 1971, until September 10, 1971. In November, 1971 he was readmitted to the hospital for an arteriogram which disclosed advanced arteriosclerosis of the three major blood vessels of his heart. Surgery performed in December, 1971 involved the removal of the three badly diseased major arteries and their replacement with veins taken from his legs. The operation is described as bilateral aorta right, aorta left, coronary vein by-pass graft, cardiopulmonary by-pass.

The railroad admitted that the conductor was caught between the two cars, but denied all allegations of fault with respect to Petrycki's claimed injury or disease. During the trial, expert testimony was offered on behalf of both parties regarding the cause of Petrycki's heart attack. Dr. Gregori and Dr. Bernard L. Charms, an expert cardiologist, were Petrycki's witnesses. Dr. Gregori testified that it was probable that an episode such as that experienced by Petrycki in the railroad yard could have precipited a heart attack or heart failure. Dr. Charms saw Petrycki about two weeks before trial, and thus well after the heart surgery had been performed. He was of the opinion that Petrycki's heart disease had developed over a period from twenty to thirty years, and that because of this condition, exertion and fright could trigger bloodclots which could result in a heart attack. Dr Charms, however, also admitted that if Petrycki had been his patient after the incident in the garden, he probably would have performed an EKG and if it showed an acute myocardial infarction he would not have permitted Petrycki to return to work. The railroad's only medical witness was Dr. Elias T. Saadi, who had been called in by Dr. Gregori for consultation regarding Petrycki's condition in September of 1971. It was Dr. Saadi's opinion that

Petrycki's heart attack took place 24 to 48 hours before entering the hospital and did not occur as a result of the railroad accident. Dr. Saadi was also of the view that Petrycki suffered a moderate heart attack while in his garden a month prior to his admission to the hospital. He also gave his opinion that Petrycki did not suffer any heart attack at the railroad yard on August 25th.

The court declined to give an instruction requested by Petrycki's counsel on the *ad damnum* clause of the complaint, stating the laudatory policy of avoiding a statement to the jury of the amount prayed for, which has no evidentiary value whatsoever.

After four days of trial the case was submitted to the jury. Having deliberated for a short while, the jury submitted the following question to the court in writing:

> Are we correct in understanding we may award only up to the amount asked for by the plaintiff and, if so, is the figure $205,000 quoted as the maximum?

The judge's written response was:

> The prayer of the complaint sets forth the maximum amount that may be awarded. The prayer is for $250,000.

This correspondence did not take place in open court and was in the absence of counsel and without their knowledge. Counsel therefore had no opportunity to object to the court's answer nor to make suggestions regarding an appropriate instruction.

The attorneys were outside the courtroom and were advised by a court attendant that the jury had just reached a verdict; they went into the courtroom where the court told them what had taken place in their absence, as follows:

(Thereupon the following proceedings were had in the courtroom immediately prior to the jury returning its verdict:)

The Court: The jury sent out a note and, frankly, I did not discuss this with counsel because the note reveals something which is more or less an indication of who the verdict is for. But what I did, I sent back a note to the jury in response to the question, and I put it on the record at the time. The note from the jury reads:

"Are we correct in understanding we may award only up to the amount asked for by the plaintiff and, if so, is the figure $205,000 quoted as the maximum?"

"The prayer of the complaint sets the maximum amount as $250,000."

Now, I wasn't in any position to discuss th... with you gentlemen because it did reveal some of their thinking in the back room.

So I do want to inform you about that and I put it on the record at the time, contrary to my policy to ever instruct a jury anything when counsel isn't present; but I felt under the circumstances I couldn't very well.

(At this point, the jury returned to the courtroom with their verdict.)

The jury's verdict was for $247,400. Motions for judgment notwithstanding the verdict and for a new trial were denied.

Issue

We find it necessary to consider only whether the effect of the District Court's having answered the sequestered

jury's question, without prior notice to counsel, was such as to render that action reversible error.[1]

OPINION

The Supreme Court has recently affirmed the basic proposition that communications between a judge and a jury, without notice to counsel, constitute reversible error. *Rogers* v. *United States,* 422 U.S. 35 (1975). In *Rogers* defendant's conviction for threatening the life of the President was reversed because the trial judge failed to respond adequately in open court and in the presence of counsel to a jury communication asking whether it could return a verdict of "[g]uilty as charged with extreme mercy of the Court."

The same rule applies equally to civil actions and criminal cases and is illustrated by the reliance in *Rogers* upon *Fillippon* v. *Albion Vein Slate Co.,* 250 U.S. 76 (1919), a civil action. Chief Justice Burger, writing for the Court in *Rogers,* stated:

> In *Fillippon* v. *Albion Vein Slate Co.,* 250 U.S. 76 (1919), the Court observed "that the orderly conduct of a trial by jury, essential to the proper protection

---

1. It is not necessary for us to consider the Railroad's motion for judgment notwithstanding the verdict because in the conclusion of both of its briefs the only relief sought was reversal of the order of the trial court overruling the motion for a new trial on all issues of the case. See Rule 28(b) Fed. Rules App. P. Whether the Railroad is entitled to a directed verdict may be determined on the retrial of the case. Nor is it necessary for us to consider the other errors pointed out by the Railroad as they may not recur in the retrial of the case.

> of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Id.*, at 81. In applying that principle, the Court held that the trial judge in a civil case had "erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction." *Ibid.* (422 U.S. at 38)

This court has had a recent opportunity to apply the guidance provided by the Supreme Court. In *United States* v. *Gay*, 522 F. 2d 430 (6th Cir. 1975), we said:

> The Supreme Court has recently dealt with the matter of communications between a jury and the trial judge and concluded that messages from a jury should be answered in open court with an opportunity for counsel to be heard before the court responds. *Rogers* v. *United States*, [422] U.S. [35], 43 U.S.L.W. 4763 (June 17, 1975). The holding was based upon the requirements of Rule 43 and cases decided prior to the effective date of the rules. In *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919), a civil action, the Court held that the parties have the right to be present in person or by counsel "at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." In *Shields* v. *United States*, 273 U.S. 583, 588-89 (1927), the Court noted that *a fortiori*, the same rule would apply in a criminal case.
>
> We hold that it was error for the District Judge to engage in discussions with members of the jury after it was impaneled and to consider requests for excuses out of the presence of the defendant and without giving notice to defense counsel.

In *Gay* we recognized that such communication may amount to harmless error:

> The Supreme Court noted in *Rogers* that "a violation of Rule 43 may in some circumstances be harmless error . . ." (43 U.S.L.W. 4765). Even though the appellant has not been able to demonstrate prejudice in the present case, the total absence of a record of the proceedings in which the changes in the makeup of the jury occurred requires us to assume prejudice.

Thus a court's ex parte communication with the jury will not require reversal where substantive rights of parties have not been adversely affected. In *Charm Promotions, Ltd.* v. *Travelers Indemnity Co.*, 489 F. 2d 1092 (7th Cir. 1973), such communications were held subject to the "harmless error" rule set forth by F. R. Civ. P. 61:

> No error . . . anything done . . . by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The action of the district court herein, answering the jury's question in the absence of counsel, took place without the benefit of the views so recently expressed by the Supreme Court in *Rogers*, and by this court in *Gay*. Had those authorities been available, we are convinced, the district court would not have considered revelation of some of the jury's thinking to have been controlling. With *Rogers* and *Gay* available, the district court would have focused on whether an answer without presence of counsel might in fact adversely effect (*sic*) the substantive rights of either party. We reach the conclusion that the secret communication herein was error which, absent affirmative evi-

dence to the contrary, cannot be said to have been harmless.

The jury's inquiry herein came after the case had been submitted to the jury and during its deliberation, a crucial period in the trial process. Though the court had earlier declined to give an instruction on the *ad damnum*, it did so in response to the jury's question. In both instances counsel were denied input into any instruction on the matter. If counsel had been accorded the right to be present during the court's consideration of the jury's question, and to recommend appropriate instructions on the law applicable to the relative significance of the *ad damnum* clause in a complaint, counsel might have recommended that no definitive response be made. Similarly, the railroad's counsel might well have requested the court, for example, to instruct the jury that it should not concern itself in any way with the amount prayed for in the complaint and that they should award only such damages as were actually caused by whatever negligence it may attribute to the railroad. We note, further, that counsel for Petrycki, in his closing argument to the jury, had asked for only $205,000, although the amount prayed for was $250,000. The jury's prompt return of a verdict for $247,400, an amount only slightly below that set forth in the *ad damnum* clause, indicates strongly that the jury may well have been influenced by the instruction, at least to the extent of $42,400.

It is true that the jury's note carried an implication that it had decided for Petrycki and was interested only in the amount it could award. Still, the jury's deliberations had not ended. It cannot be said with certainty that the jury had in fact decided for Petrycki or that any such decision, if it had been made, might not be revoked as deliberations continued. What counsel, if present, might have done and what the effect of their absence on the final verdict may

have been are matters of conjecture. That such considerations raise the possibility of adverse effects upon substantive rights, and that no countervailing evidence of harmlessness is present, is sufficent, however, to require reversal. As the Supreme Court held in *Fillippon, supra*:

> [i]n jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it *affirmatively* appears that they were harmless. [Emphasis added.] 250 U.S. at 82.

The giving of a secret instruction has been held reversible error unless "it appears with certainty that no harm has been done . . ." *United States* v. *Compagna*, 146 F. 2d 524, 528 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

Because we cannot say with certainty that no harm was done in this case by the correspondence between the court and the jury, with counsel absent, we must reverse and remand for a new trial.

APPENDIX B

UNITED STATES COURT OF APPEAL
For The Sixth Circuit

No. 75-1371

MICHAEL PETRYCKI,

Plaintiff-Appellee.

v.

YOUNGSTOWN & NORTHERN RAILROAD COMPANY,

Defendant-Appellant.

Before: WEICK, Circuit Judge; LIVELY, Circuit Judge, and MARKEY, Chief Judge, United States Court of Customs and Patent Appeals.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded for a new trial.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT,
JOHN P. HEHMAN
(signed)

Clerk.

A True Copy.

.....

Deputy Clerk.

Supreme Court of the United States

October Term, 1976

No. 76-97

MICHAEL PETRYCKI,
Petitioner,

vs.

YOUNGSTOWN & NORTHERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is fully presented in the Brief for the Petitioner, and is reported at 531 F.2d 1363 (6th Cir. 1976).

JURISDICTION

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals for the Sixth Circuit correctly held that the District Court erred when he secretly instructed the jurors, in the absence of counsel or court reporter, and after the jury was sequestered, concerning the maximum amount of damages which the jury could award.

COUNTERSTATEMENT OF THE CASE

This is a Federal Employer's Liability Act case under 45 U.S.C.A., Sections 50 through 61, combined with an alleged Federal Safety Appliance Act violation under 45 U.S.C.A., Sections 1 through 32. Plaintiff was a brakeman employed by the Youngstown and Northern Railroad Company, an Ohio common carrier by railroad subject to both acts.

Plaintiff's complaint was filed in January, 1974, almost two and one-half years after his alleged injury. The circumstances surrounding his alleged injury were unusual in that no direct trauma was inflicted on plaintiff at the date of the alleged injury, August 25, 1971. Rather, he claimed to have been agitated on August 25, 1971, into a coronary heart attack five days after August 25, 1971. His agitation came from witnessing an injury to a fellow employee. The case was tried to a jury.

Sharply contradictory expert testimony was offered as to the cause of plaintiff's admitted heart attack. Conflicting factual testimony was offered as to his conduct and extent of movement at the time he witnessed the other employee's admitted injury. The injury to the other em-

ployee occurred when the other employee caught his thumb between two couplers while attempting to adjust one coupler so it could be connected with another.

The trial lasted four days. The case was submitted to the jury by the Court shortly after one o'clock on October 1, 1974. After less than an hour and a half's discussion, the jury submitted a question to the Court in writing. The question was:

> "Are we correct in understanding we may award only up to the amount asked for by the plaintiff [in his closing argument] and, if so, is the figure $205,000 quoted as the maximum?"

Without consulting counsel, or even advising them that the question had been submitted, the Court, in the absence of the court reporter, sent an answer in writing to the jury. The answer to the jury was:

> "The prayer of the complaint sets forth the maximum amount that may be awarded. The prayer is for $250,000."

Earlier, during a discussion on requests to charge, the Court had refused plaintiff's counsel's request that the Court read the ad damnum to the jury.

Thereafter, the jury's question and the Court's answer were dictated by the Court to the court reporter. A few minutes later, after the jury had advised the Court that they had agreed upon a verdict, but before they had announced the verdict, counsel were finally notified of the question and the secret instruction. The jury's verdict was for $247,400.

Motions for judgment notwithstanding the verdict under Rule 50, or, in the alternative, for a new trial under Rule 59, were made and overruled.

On appeal, Respondent presented four issues for review. Stated briefly, they were that the District Court erred when he secretly instructed the jurors in the absence of counsel while they were sequestered during their deliberations; erred in failing to set aside the verdict of the jury on the ground that it was ' ainted by passion and prejudice; erred in the admission of certain hypothetical questions posed by plaintiff's counsel to plaintiff's doctors; and erred in holding that there was sufficient probative evidence of a Safety Appliance Act violation and of a causal connection between such alleged violation and plaintiff's injury to permit the issue to be sent to the jury.

The Court of Appeals decided only the first claim of error. It held that the District Court committed reversible error when he secretly instructed the jurors in the absence of counsel or court reporter and without prior notification to counsel of a question propounded by the jury or of his intended response. In reaching its decision, the Court of Appeals considered and applied the Supreme Court's recent decision in *Rogers v. United States*, 422 U.S. 35 (1975), and an earlier decision of this Court, *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), a civil action.

The Court of Appeals recognized that in giving a secret instruction to the jury the District Court committed error. (Petitioner does not dispute this. Nowhere in his petition is any claim made that the District Court did not commit error.) The Court of Appeals did not stop there, however. Rather, pursuant to this Court's statement in *Rogers*, the statement of Judge Learned Hand in *United States v. Compagna*, 146 F.2d 524, 528 (2nd Cir. 1944), *cert. den'd*, 324 U.S. 867 (1945), and the recent decisions of the Sixth and Seventh Circuits, the Court of Appeals considered whether the error committed was "harmless" error. After carefully reviewing the factual setting in

which the error took place, the time at which the error took place, and the instruction which the court gave in response to the question, the Court of Appeals determined that it could not say that the error was harmless, and consequently reversed and remanded for a new trial.

Petitioner, in total disregard of what the Court of Appeals said, and in total and complete disregard of relevant decisions of this Supreme Court and of various Circuits of the Court of Appeals, makes numerous claims as to why this Superme Court should take this case. Petitioner claims that the decision of the Sixth Circuit is in conflict with *Rogers*, is in conflict with decisions of other Circuits of the Court of Appeals, amounts to the establishment of a new and improper "rule", and, extraordinarily, that the conduct of the Court of Appeals was so egregious that, pursuant to Rule 19, Rules of the United States Supreme Court, this Court should take certiorari because the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Even a cursory review of the decision of the Court of Appeals and of the precedents cited therein reveals that the Court of Appeals applied *Rogers* properly, analyzed this case in terms of the harmless error rule, relied upon and applied *Compagna* and a recent decision of the Seventh Circuit, and, in short, decided the case correctly. Rather than being an extraordinary case which, as Petitioner alleges, constitutes a radical departure from the ordinary course of judicial proceedings, it is respectfully submitted that the decision of the Court of Appeals presents a classic example of the correct application of existing and controlling precedent to a difficult situation. Consequently, it is respectfully submitted that this Supreme Court should deny Petitioner's petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

1. The first reason urged by the Petitioner for granting the writ is that the Court of Appeals ignored *Rogers v. United States, supra*, and particularly ignored the statement in *Rogers* that, in proper circumstances, the "harmless error" rule could apply. The Sixth Circuit did no such thing. At pages A7, A8, and A9 of its decision (page references are to Appendix A to Petitioner's brief), the Sixth Circuit analyzes *Rogers* in detail, and notes that the Sixth Circuit already had applied "the guidance provided by the Supreme Court" in *Rogers* in *United States v. Gay*, 522 F.2d 430 (6th Cir. 1975). The Sixth Circuit specifically notes that, in *Gay*, it recognized that secret communication between the Court and the jury "may amount to harmless error" and "will not require reversal where substantive rights of parties have not been adversely affected." (A8 and A9).

After analyzing these precedents, the Sixth Circuit held:

> "We reach the conclusion that the secret communication herein was error which, absent affirmative evidence to the contrary, cannot be said to have been harmless." (A9-A10).

The next paragraph of the Opinion analyzes in great detail why the Sixth Circuit could not say that the error was harmless. In short, the Sixth Circuit recognized that the inquiry from the jury came at "a crucial period in the trial process." Recommendations each counsel could have made were discussed. Also, the Court of Appeals believed that the jury might well have been influenced by the secret instruction, particularly because the secret instruction was not embellished with a cautionary statement that the prayer for relief did not in any way constitute evidence and that, in fact, the jury should not concern itself with it whatsoever.

In short, if the trial court intends to read the prayer for relief to the jury, it is important that counsel know this will be done and that the jury be properly informed by both court and counsel that the prayer for relief does not constitute evidence, cannot be considered by the jury except as fixing the maximum amount of the verdict, and must not be otherwise considered by the jury. Here the secret instruction does not contain any of these safeguards. Rather, it stated simply that the prayer of the complaint set forth the maximum amount, and that amount was $250,000.00. One can hardly assume that a jury is familiar with the terms "complaint" and "prayer for relief." The trial judge enlightened the jury on none of these matters at the time it gave its secret instruction.

Of course, reference to the prayer for relief was made in the course of the court's regular instructions. It was made more than midway through the instructions, which take up approximately 33 pages in the record, and 21 pages in the Appendix. It is conjectural to believe that the jury would remember the admonitions concerning the prayer for relief inserted in the midst of all of these lengthy instructions. For the trial court properly to have instructed the jury with respect to the prayer for relief in a supplementary instruction, he should have repeated and explained that instruction. This he did not do.

Finally, it is essential to remember that at a critical stage of the trial, after the jury had commenced its deliberations, a dollar amount was given to it, without explanation, by the symbol of authority, neutrality and partiality, the trial judge. It was these facts and considerations which compelled the Court of Appeals to reverse this case.

2. No doubt aware that the "conventional wisdom" is that petitions for certiorari are most often granted when a conflict exists between or among the Circuits of the Court of Appeals, Petitioner strains mightily to create a conflict between the instant case and *Charm Promotions Ltd. v. Travelers Indemnity Co.*, 489 F.2d 1092 (7th Cir. 1973). No matter how hard Petitioner strains, no conflict exists. As in the instant case, the Seventh Circuit in *Charm* applied the harmless error rule (Rule 61, Federal Rules of Civil Procedure). The Sixth Circuit agrees with the application of this rule. Further, *Charm* relied strongly on *United States v. Compagna, supra*, and stated that *Compagna* "represents sound doctrine." Similarly, the Sixth Circuit also relied on *Compagna* (A11). The Seventh Circuit quoted from that portion of *Compagna* where Judge Learned Hand stated that secret communications, while error, would be subject to the harmless error rule and that "while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity."

This is precisely the quotation which the Sixth Circuit used and applied in the instant case. Thus, rather than being in conflict with *Charm*, the instant case closely parallels *Charm*.

It must be mentioned that Petitioner seriously misstates *Charm*. Petitioner claims that *Charm* announced "that a more restrictive rule should prevail in criminal cases where an individual's liberty is at stake and contrariwise, a less rigorous standard is mandated in civil cases." (Petitioner's Brief, p. 15). This is not an accurate *Charm* paraphrase. *Charm* analyzed *Compagna* and *Walker v. United States*, 322 F.2d 424, 435 (D.C. Cir. 1963), *cert. den'd*, 375 U.S. 976 (1954), where the Circuit for the District of Columbia also said: "Such an error does not require reversal, however, when the record shows with reasonable certainty that it did not prejudice a defendant's substantial rights."

After analyzing *Walker* and *Compagna*, the Court in *Charm* stated:

> "*Walker* and *Compagna* were criminal cases but that does not render them inapposite; on the contrary, the refusal to apply a per se rule when an individual's liberty is at stake is persuasive authority that a more rigorous standard is not mandated in civil cases."

Thus, what *Charm* said was that a more restrictive standard was not required in civil cases than in criminal cases. It did not say that a less rigorous standard applied to civil cases.

To a great extent, the heart of Petitioner's claim is that the Sixth Circuit erred in the instant case because it did not apply a less rigorous standard in a civil case than applies in a criminal case. But no authority has taken this position. Petitioner implies that this Supreme Court did so in *Rogers*. However, a review of *Rogers* demonstrates that this Court never implied a dichotomy between civil and criminal cases. In fact, the opposite inference is appropriate because of this Court's lengthy quotation from *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), a civil case. In *Fillippon*, this Supreme Court unanimously condemned the giving of a secret instruction by the trial court. Moreover, with respect to the prejudicial effect of such a secret instruction, this Court stated:

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish grounds

for reversal unless it affirmatively appears that they were harmless."

Other decisions of the Court of Appeals apply the same standard in a civil case as in a criminal case. For example, in *Snyder v. Lehigh Valley Railroad Company*, 245 F.2d 112 (3rd Cir. 1957), a civil case, the Third Circuit stated:

> "Whether the sum total of the possibilities stated amounted to a positive affirmative showing of substantial prejudice is unnecessary to a finding that the communication between judge and jury in the absence of counsel here constituted reversible prejudicial error. The strong possibility of substantial prejudice demonstrated here is more than sufficient." p. 116.

Similarly, in *Parfet v. Kansas City Life Ins. Co.*, 128 F.2d 361 (10th Cir.), *cert. den'd*, 317 U.S. 654 (1942), another civil case, the Court held:

> ". . . It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown."

The Sixth Circuit in the instant case applied the correct standard of law. Its decision was correct. No amount of twisting of *Rogers*, or misstatement of *Charm* and *Compagna*, will alter this conclusion.

CONCLUSION

The decision of the Circuit Court in this case carefully applied *Rogers v. United States, supra,* and is not in conflict with, but is in conformity with, decisions of the various Circuits of the Court of Appeals.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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